No. 90-27

In The

Supreme Court of the United States

October Term, 1989

WALLACE E. HECK, SR.
AND
H.G. DISTRIBUTORS, INC.

Petitioners,

versus

MARK K. ANDERSON,
KELLOGG-MOORE OIL CO., INC.
AND
HOWARD GRIFFIN DISTRIBUTORS, INC.

Respondents.

RESPONSE OF RESPONDENTS TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI INCLUDING AN OBJECTION TO THE JURISDICTION OF THIS HONORABLE COURT

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QUESTION PRESENTED FOR REVIEW

Should the Supreme Court grant a writ of review of the decision of the State of Louisiana Court of Appeal, First Circuit, in *Anderson v. Heck*, 554 S. 2d 695 (La. App. 1st Cir. 1989) Writ denied, March 30, 1990.

LIST OF ALL PARTIES

Mark K. Anderson

Kellogg-Moore Oil Company, Inc.

Wallace E. Heck, Sr.

H.G. Distributors, Inc.

Howard Griffin Distributors, Inc.

John L. Luffey, Jr., Executor of the Estates of Howard Griffin and Birdie McMurrain Griffin

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STATEMENT OF THE CASE

Petitioners are in error in stating the case "involves the credit purchase" by Heck from respondents. There was an agreement to buy and sell stock of H.G. Distributors, which stock was owned by respondents.

REASONS WHY THE PETITION SHOULD BE DENIED

DEAFNESS ISSUE

At the time of the commencement of the trial and after a request for sequestration of witnesses had been made by counsel for respondents herein, counsel for petitioners herein, stated Mr. Heck, was "hard of hearing" and sought an exception to the sequestration rule and to have Mr. Heck's son, Heck, Jr., who was to be a fact witness, to sit in the courtroom to assist Mr. Heck. Counsel for respondents objected to the request. The Court did not permit Heck, Jr. to sit in the courtroom. Counsel for petitioners then sought to have Heck, Jr. sit in the courtroom as a representative of H.G. Distributors. Counsel for respondents objected again. The Court again refused to permit Heck, Jr. to be excepted from the order of sequestration of witnesses.

See Appendix, page 1a.

(Copied from Transcript of Trial, dated March 18, 1987).

The first witness called to testify by respondents herein was Mr. Heck, Sr. under cross-examination. He testified for several pages of the transcript and only once

said he did not hear a question. He was able to answer questions in a fashion preferred by him, which was probably the cause of the unacceptability of his testimony by the Trial Court, not his purported deafness.

Sometime later in the trial Heck presented a witness to testify relative to his hearing ability. At that time the Court stated it had not prohibited having someone sit with Mr. Heck.

See Appendix, page 4a.

(copied from Transcript of Trial dated April 27, 1987).

Thereafter, Heck's other son, Raymond Heck, who was not a witness, sat by Mr. Heck for the remainder of the trial. Petitioners did not request a recommencement of the trial.

The Louisiana law cited by petitioners are correct. (La. C.C.P. Art. 192.1 and R.S. 46:2361).

However, petitioners fail to cite any authority for the proposition that these statutes or interpretations by the Louisiana courts are repugnant to the Federal Constitution.

The purported issue of a Federal Constitutional involvement has only been urged in this Court.

Petitioners' original brief filed in the Louisiana Court of Appeal, makes no reference to a Federal Constitutional issue.

See Appendix, page 9a.

In petitioners' reply brief in the Louisiana Court of Appeal, no mention was made of a constitutional issue.

See Appendix, page 13a.

In petitioners' application for a writ of review to the Supreme Court of Louisiana, of the judgment of the 1st Circuit Court of Appeal of Louisiana, no mention is made of a Federal Constitutional issue relative to petitioner, Heck's, purported deafness.

See Appendix, page 18a.

No reference is made to the Federal Constitution.

The Louisiana Court of Appeal ruled the deafness issue was harmless error.

> " . . . The application of a state harmless error rule is, of course, a state question where it involves only errors of state procedure or state law. – "
>
> *Chapman v. California*
> 87 S. Ct. 824, 826, 386 U.S. 18, 19

THE SECURITIES LAW ISSUE

Petitioners seek to invoke the Federal Securities Act of 1933. True, the Louisiana Court of Appeal referred to the Blue Sky Law. However, it did not apply that law. Petitioners never from its pleadings or evidence sought to invoke the Blue Sky Law. This law was not urged until petitioners' new counsel made mention of it in the Louisiana Court of Appeal in a supplemental brief.

The Louisiana Court of Appeal stated it did not consider the case as one to which the Blue Sky Law applied.

Reference in the decision of the Court of Appeal to *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S. Ct.

2312, 85 L.Ed.2d 692, was dicta and totally irrelevant as to whether the Federal Securities Act of 1933 is applicable to the transaction in question.

Furthermore, no showing is made as to how the Louisiana Court of Appeal erred in not applying the Federal Securities Act of 1933.

Petitioners admit in their application that Federal Constitution issues were not raised in the Louisiana courts.

No substantial Federal question has been presented to the Court, therefore, certiorari should be denied.

28 U.S.C. 2111

OBJECTIONS TO JURISDICTION OF THIS COURT

Petitioners have failed to comply with 28 U.S.C. Sec. 1257 because petitioners do not question the validity of a statute of Louisiana on the basis such statute is repugnant to the U.S. Constitution, treatise or laws. No immunity was "specially set up or claimed" under the Constitution, Treatise or statutes of, or any commission held or authority exercised under the U.S.

This Court should not entertain jurisdiction of this matter because there are no "special and important reasons" for granting a writ of certiorari. Rule 10 of this Court.

There is no contention by petitioners that Rule 10 (b) and (c) are applicable.

Petitioners did not urge the constitutional issue of due process in the Trial Court, the Louisiana Court of Appeal or the Supreme Court of Louisiana. Not once was the 14th Amendment mentioned in any of petitioners' pleadings or brief in the Trial Courts and Court of Appeal and their application for writ of review to the Supreme Court of Louisiana.

No mention of a federal issue was made in the opinion of the Louisiana Court of Appeal.

28 U.S.C. 1257 requires the petitioner in the State Court to "specially set up or claim under the Constitution. . . . of . . . the United States", the right he seeks to have this court enforce.

Webb v. Webb, 101 S.Ct. 1889 (1981)
451 U.S. 493, 68 L.Ed. 392

See also:

Parker v. McLain
237 U.S. 469; 35 S.Ct. 632

DeBacker v. Brainard
396 U.S. 28, 90 S.Ct. 163

Petitioners acknowledged in their jurisdictional statement that Federal Constitution issues were not specifically raised in the Louisiana courts.

Since petitioners failed to raise a federal claim in the state proceedings and the Louisiana courts failed to rule on a federal issue, this Court is without jurisdiction.

SECURITIES LAW ISSUE

Petitioners also urge certiorari because the Louisiana Court of Appeal stated by way of dicta it would not follow this Court's holding in *Landreth Timber Co. vs. Landreth,* supra. The Louisiana Court of Appeal did not apply the Louisiana Blue Sky Law.

The Court stated "There was no security transaction" within the purview of the Louisiana Blue Sky Law." Petitioners' Appendix A-8.

SANCTIONS FOR FRIVOLOUS APPEAL

Penalties should be imposed upon petitioners for a frivolous appeal.

Deming v. Carlisle Packing Co.
33 S.Ct. 80 (1912)
226 U.S. 102

CONCLUSION

Petitioners have failed to raise any Federal Constitution issues or Federal laws applicable to the case which are substantial or which would warrant granting of certiorari.

The objection to the jurisdiction should be sustained for the reasons heretofore stated and the Court should impose sanctions and penalties upon petitioners for a frivolous appeal.

Respectfully submitted:

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APPENDIX 1

TRIAL TRANSCRIPT MARCH 18, 1987

(p. 6) MR. MCCOWAN: Your Honor, with respect to the sequestration request, I certainly have no objection to (p. 7) it. However, as the court may know, Mr. Heck is hard of hearing; and, therefore, I would like an exception to the sequestration rule to allow his son to sit in with him.

THE COURT: Is the son going to be a witness?

MR. MCCOWAN: Yes, sir, his son is going to be a witness.

THE COURT: Uh, his son doesn't use sign language, does he, with Mr. Heck?

MR. MCCOWAN: No, sir he writes him notes. Does counsel have any objection? I don't –

MR. D'AMICO: I certainly do.

(REPORTER'S NOTE: The witnesses were sequestered.)

MR. D'AMICO: May I ask the court, excuse me, counsel, uh, with reference to our – the procedure in this matter, Your Honor.

(REPORTER'S NOTE: Off-the-record discussion.)

MR. MCCOWAN: Your Honor, now that the supplemental (p. 8) pleadings have been filed, not only Wallace Heck, as an individual defendant, but H. G. Distributors is now a defendant; and I would ask the court for permission to designate Wallace Heck, Jr., as a representative of H. G. Distributors.

THE COURT: Who is the owner of the Stock?

MR. MCCOWAN: Mr. Heck, Sr.

THE COURT: Why should, uh – on what basis would, uh, Junior be allowed to be the representative of that company?

MR. MCCOWAN: As – he's an officer of the company. As a corporate representative.

THE COURT: But Mr. Heck, Sr., is the sole – sole stockholder?

MR. MCCOWAN: Yes, sir.

THE COURT: All right. I would deny your request.

MR. MCCOWAN: Well, then, I would ask the court for request to have Mr. Heck, Jr., sit in and Mr. Heck, Sr., leave (p. 9) the courtroom because Mr. Heck, Sr., can't hear; and it doesn't do us much good, uh, to have a client who can't help us in connection with the matter, and Mr. Heck, Sr., would be under the rule of sequestration, and Mr. Heck, Jr., could sit in.

MR. D'AMICO: I object to that, Your Honor. I – Mr. Heck is the party to this litigation, not Heck, Jr. He can hear. We've taken depositions. He's been around.

THE COURT: I didn't know that we were going to have a problem with any, uh, physical infirmities of Mr. Heck. Those had not been discussed. I don't know what the limitation of Mr. Heck's hearing is. If there was going to be any problem and we would have to have an amplification system, I have attorneys who will bring such system in so that they can even hear. Since there's an

objection to letting Mr. Heck, Jr., come in in lieu of Mr. Heck, Sr., well, then, uh, I would not allow, Junior in for (p. 10) Senior.

* * *

APPENDIX 2

TRIAL TRANSCRIPT APRIL 27, 1987

MR. MCCOWAN: Your (p. 17) Honor, I object to that. Ms. Tate doesn't know the value. I mean, that person can take notes. I'm trying to try a lawsuit and it's very difficult for me to take notes and give Mr. Heck a verbatim when I'm trying to listen and do two things at once. And so, the value is not Ms. Tate's to determine, it's the court's to determine.

THE COURT: The question Mr. D'Amico asked was the same question I was going to ask. I have never prohibited you from having someone sit with Mr. Heck or repeat questions and answers. I have, under the sequestration, prohibited Mr. Heck, Jr., from doing that inasmuch as he is a fact witness. And the court will allow Ms. Tate or anyone else to come in and sit by Mr. Heck and tell him what the questions are and what the answers are.

MR. MCCOWAN: Your Honor, I asked that Margaret Heck be permitted to come in and you wouldn't do that, you (p. 18) wouldn't allow that, and she's not a witness in this proceeding.

THE COURT: I don't recall not letting Margaret Heck, a nonwitness. I will let you have anyone in here, other than a fact witness or an expert witness, to sit by Mr. Heck. If the court has refused to let someone other than a fact witness sit and give him questions and answers, well then, I certainly apologize. I did not know I had done that. It was my understanding, you wanted Heck, Jr., In here.

MR. D'AMICO: That's my recollection, Your Honor.

MR. MCCOWAN: Your Honor, I'll find it in the -- and I'll call it to the court's attention.

MR. D'AMICO: I don't have any further questions.

THE COURT: Any other questions?

MR. MCCOWAN: No, sir.

THE COURT: Thank you very much.

(p. 19) Witness Excused

. . . .

THE COURT: As I just stated, I will let a nonfact or a nonexpert witness come in and sit by Mr. Heck and let that person give him questions and answers. I just would not allow a fact witness.

MR. MCCOWAN: He says he will let anybody but brother that you want to come in and sit with you, but he won't let brother or Shirley or Raymond or any of the facts witnesses come in and sit with you. Do you want to call somebody to come in?

MR. HECK: Well I would like to call somebody to tell me what's going on.

MR. MCCOWAN: All right, sir.

MR. HECK: Can brother come in after he testifies?

MR. MCCOWAN: We haven't gotten to that point yet.

MR. HECK: Huh?

(p. 20) MR. MCCOWAN: That will be up to Mr. Sam and them. Do you have any objection to that, Mr. Sam?

MR. D'AMICO: Not until we finish.

MR. MCCOWAN: He has objection to that, Mr. Heck.

MR. HECK: Let me go make a call and see if I can get somebody.

MR. MCCOWAN: Is that all right, Your Honor?

THE COURT: Sure.

MR. MCCOWAN: Okay, Mr. Heck. Go Ahead.

Off-the-record Discussion

. . . .

THE COURT: Mr. McCowan, for the record, I have not ruled upon Heck, Jr., assisting his father after his testimony. That was not asked of me. You asked Mr. D'Amico and that response was between the two of you.

MR. MCCOWAN: Yes, sir, I understand.

THE COURT: So I don't (p. 21) want you to think that the record reflects that I have denied Heck, Jr., from helping his father after he's testified.

MR. MCCOWAN: Yes, sir. I understand.

THE COURT: All right.

Off-the-record Discussion

. . . .

MR. MCCOWAN: Mr. Heck's son, Raymond, who we don't anticipate calling, Your Honor, is on his way.

THE COURT: From where?

MR. MCCOWAN: Out at Choctaw.

THE COURT: All right. When Mr. Raymond Heck gets here, of course, let me know and we will go ahead and start court.

MR. MCCOWAN: He's coming right now, Mr. Heck?

MR. HECK: Yes, he's leaving the office.

MR. MCCOWAN: Thank you, Your Honor.

THE COURT: Let me know when he gets here.

(p. 22) Recess

. . .

MR. D'AMICO: May it please the court, I understand that Mr. Raymond Heck is here to assist Mr. Wallace Heck, Sr., in connection with hearing the testimony that is going on in the courtroom. At this time, I would like to ask the court to instruct Mr. Raymond Heck that he is not to discuss with the witnesses or anyone, as a matter of fact, the testimony that is taking place in the courtroom.

THE COURT: Mr. Raymond Heck, I understand that you are not a witness in this case. You are here for the purposes of facilitating your father in questions and answers that might be given by the various attorneys and/or by the witnesses who have been sworn to testify. Your participation, insofar as telling your father what is happening, is limited to that. You are not to talk with any of the witnesses whatsoever (p. 23) relative as to what's been said in here until after the trial is concluded. Then you may do so. Do you understand?

MR. RAYMOND HECK: Yes, sir.

THE COURT: Mr. Adcock?

MR. ADCOCK: I'd like to call Larry McDonald, please, sir.

APPENDIX 3

PETITIONERS' ORIGINAL BRIEF IN LOUISIANA COURT OF APPEAL.

* * *

J. Mr. Wallace Heck, Jr. should not have been excluded from the courtroom, under the court's sequestration order.

During the first day of the trial, counsel for Mr. Wallace Heck, Sr. informed the trial court of Mr. Heck's hearing disorder. (3-18-87 T6). Counsel requested that Mr. Heck's son, Mr. Wallace Heck, Jr., be exempted from the court's sequestration order in an effort to communicate with his father regarding the events of the trial. (3-18-87 T6). The trial court refused this request.

On April 27, 1987, Ms. Grace Tate, a certified hearing ardiologist [sic], testified as to Mr. Heck, Sr.'s hearing deficiency. (4-27-87 T8-19). She testified that, when she last examined Mr. Heck, in 1983, that he had suffered a seventy-five percent hearing loss. (4-27-87 T10). She further testified that, even with the help of hearing aids, Mr. Heck could only "hear on a one-to-one basis, if you're talking directly to him and he looks at you." (4-27-87 T10). Mr. Heck, Sr. also testified several times that he could not hear certain questions that were being asked of him, and was hampered in assisting counsel by his inability to hear. (4-29-87 T191, 8-17-87 T19).

Mr. Heck was clearly prejudiced in the defense of this matter by the trial court's denial of the assistance of a person to communicate the happenings of these proceedings. The trial court clearly erred in this regard.

Louisiana Code of Civil Procedure article 192.1 provides:

> A. *In all civil cases* and in the taking of any deposition *where a party* or a witness *is a* deaf or *severely hard of hearing person, the proceedings of the trial shall be interpreted to him in a language that he can understand* by a qualified interpreter appointed by the court.
>
> B. In any case in which an interpreter is required to be appointed by the court under the provisions of this article, the court shall not commence preceedings [sic] until the appointed interpreter is in court in a position not exceeding ten feet from and in full view of the deaf or severely hard of hearing person. The intrepreter [sic] so appointed shall take on oath that he will make a true interpretation to the deaf or severely hard of hearing person of all the preceedings [sic] of the case in a language that he understands, and that he will repeat the deaf or severly hard of hearing person's answer to questions to counsel, court or jury in the English language to the best of his skill and judgment.
>
> Interpreters appointed in accordance with the provisions of this article shall be paid not less than fifteen dollars nor more than fifty dollars a day, the amount to be determined by the judge presiding. In the event travel of the interpreter is necessary, all of the actual expense of travel, lodging and meals incurred by him in connection with the case at which he is appointed to serve shall be paid at the same rate applicable to state employees. All the costs of the services of such interpreters in civil cases shall be taxed as costs of court.

(emphasis added). The above-quoted article is a mandatory provision requiring the court to appoint a person to

interpret the proceedings in a "language that he can understand."

Mr. Heck, Jr. was the only one qualified to perform such a task, as requested by counsel, by writing notes to his father as it was Mr. Heck, Jr. who was familiar with the transactions and could make notes of the *meaningful* testimony for his father's comments. By not following the express mandate of this provision, the trial court clearly erred and prejudicied [sic] Mr. Heck in his defense of these proceedings.

Counsel for H.G. Distributors, Inc. also requested that Mr. Heck, Jr., as officer of the company, be excluded from the sequestration order. (3-10-87 T7-8). This request was also denied by the court. This denial prejudiced H. G. Distributors, Inc., who was unable to appoint a corporate representation, in its defense of these proceedings.

Louisiana Code of Civil Procedure article 1631 provides:

> The court has the power to require that the proceedings shall be conducted with dignity and in an orderly and expeditious manner, and to control the proceedings at the trial, so that justice is done.
>
> On its own motion the court may, and on request of a party the court shall, order that the witnesses, other than parties, be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. In the interest of justice, the court may exempt any witness from its order.

Comment (h) to that article sets forth the widely recognized rule with respect to the appointment of corporate representations. It states that "[s]ince a corporation can act only through an agent, it is intended that *a corporation's representative present at the trial is not to be excluded, even though he may be a witness in the case.*" (emphasis added). *See also Maryland Casualty Co. v. DeVilbiss Co.*, 323 So.2d 871, 873 (La. App. 2nd Cir. 1975).

APPENDIX 4

PETITIONERS' REPLY BRIEF IN LOUISIANA COURT APPEALS

* * *

J. Mr. Wallace Heck, Jr. should not have been excluded from the courtroom, under the court's sequestration order.

Plaintiffs seek to assert that Mr. Heck was not prejudiced by the trial court's refusal to allow Mr. Wallace Heck, Jr. to be excluded form [sic] the court's sequestration order. It is an undisputed fact that Mr. Heck is severely hard of hearing. (4-27-87 T8-19). As noted in his original brief, Mrs. Grace Tate testified that Mr. Heck could only "hear on a one-to-one basis, if your're [sic] talking directly to him and he looks at you." (4-27-87 T10).

Mr. Heck often made it known that he was unable to hear the questions posed by counsel or the testimony of other witnesses. (3-18-87 T19; 3-20-87 T25, 27, 75, 79, 80, 112, 113; 4-29-87 T191; 8-17-87 T8, 12). The difficulty that Mr. Heck had in listening to and actively participating in the proceedings was also hampered by the trial court's insistance [sic] that he watch his counsel for objections and not the person who was asking the questions. (3-20-87 T82, 89).

Mr. Heck's hearing problem also led to numerous objections by plaintiffs [sic] counsel that his answers were not responsive. *See* (3-18-87 T18; 3-20-87 T36). The trial court even felt it necessary to comment on that point:

The Court:

He has not. I don't think that he has answered maybe three questions that has been asked.

[Mr. Heck:] Sir?

The Court:

I said I don't agree with your attorney. You are not being real responsive. I don't know what it is going to take. Just answer his questions Mr. Heck. If it is necessary for you to explain, then you can explain, but you want to explain and then you never answer the question. Just listen to his question.

(3-20-87 TG8-69).

The trial judge was obviously prejudiced against what he perceived to be an unresponsive witness, and such prejudice obviously affected his judgment regarding Mr. Heck's credibility.

The record also shows that counsel for Mr. Heck was often unable to properly object to certain questions because of Mr. Heck's inability to hear those objections (3-18-87 T28-29; 3-20-87 T54-55, [sic] T59; T74.

Mr. Heck's confusion is best summarized by the following portion of his testimony:

Q. I want to ask you just one more question, Mr. Heck. I'm going to ask it to you this way, sir.

A. Wait a minute. I couldn't hear.

Q. I'm going to ask you this question. When I first questioned you on cross-examination, are you satisfied you told the truth in answer to all those questions?

Mr. McCowan: Excuse me, Your Honor. Your Honor, I object to that question on several grounds. Number one, there's already been testimony in the record that Mr. Heck couldn't hear the questions Mr. Sam was asking because he was distracted. That's the first thing. The second thing is, the witness is under oath and he doesn't have to be harassed and asked a question of that nature. Thirdly, Mr. Sam had him on testimony for an extended period of time, and how can he possibly remember everything that he said and every question that was answered. The record speaks for itself. The man was under oath when he testified. And the record also speaks for itself, he couldn't hear some of the questions.

Mr. D'Amico: Judge, the man is under cross-examination.

Mr. McCowan: There's some limits to cross-examination, Your Honor.

Mr. D'Amico: Sure there are limits. The question is, Your Honor, that I'm simply asking him did he tell the truth at the time he was under cross-examination. Now Mr. McCowan gets up here and tries to tell the court maybe he didn't tell the whole truth because he didn't understand the questions; he couldn't hear well. That's what I want to know.

The Court: Mr. Heck, you can go ahead and answer his question.

A. Do what?

The Court: You can answer his question. His question was – Mr. D'Amico. Listen to his question now. Go ahead and

answer it, and you can give whatever explanation you'd like to give with regards to your answer.

A. I don't know what he asked. I didn't hear him. What did you say?

By Mr. D'Amico:

Q. Mr. Heck, I'm simply asking you, sir, when I questioned you before on cross-examination, were you telling the truth?

A. To the best of my knowledge and to what I could hear from you. But I – Judge Brown had told me to watch Mr. – my lawyer over there, and I was trying to watch him to see when he stood up, and I could not hear you unless I'm looking at you. And so I may have confused some of the question, but I didn't do it on purpose. Let me put it that away.

Louisiana Code of Civil Procedure Article 192.1 provides that the proceedings *shall* be interpreted in a language that a party can understand when a party is severely hard of hearing. The evidence clearly reveals that Wallace Heck, Jr. was the only person competent to assist his father in interpreting and helping his father in understanding the testimony and question presented. It was Wallace Heck, Jr. who was familar [sic] with the transactions, not Raymond Heck, or Mr. Heck's counsel, and the only person who could give meaningful help to his father. By not following the express mandate of Code of Civil Procedure Article 192.1, the trial court clearly erred and both directly prejudiced Mr. Heck by not allowing him to meaningfully participate in the proceedings,

and indirectly prejudiced Mr. Heck by thinking him unresponsive to the questions of counsel because of his hearing disorder.

Although unaddressed by counsel for plaintiffs in their briefs, H.G. Distributors, Inc. also submits that it was error for the trial court not to allow Mr. Wallace Heck, Jr. to be appointed its corporate representative for H.G. Distributors, Inc. to participate in the defense of this matter.

Plaintiffs seek to assert that the actions of the trial court in not excluding Mr. Heck, Jr. from its sequestration order did not prejudice Mr. Heck or H.G. Distributor, Inc. However, it is impossible to know what additional assistance or evidence would have been provided if Mr. Heck, Jr. would have been available to assist counsel and his father in terms of additional questioning, and a more thorough explanation of the case. Mr. Heck and H.G. Distributors, Inc. submit that the only way that such new information and evidence may be made known is for this matter to be reversed to allow Mr. Heck, Jr. to participate in the process of listening to and evaluating that evidence, for the benefit of assisting counsel, his father and H.G. Distributors, Inc.

* * *

APPENDIX 5

PETITIONERS' APPLICATION TO THE SUPREME COURT OF LOUISIANA FOR WRIT OF REVIEW.

* * *

10. THE FIRST CIRCUIT COURT OF APPEAL ERRED IN FINDING THAT THE TRIAL COURT'S REFUSAL TO HONOR MR. HECK'S REQUEST FOR AN INTERPRETER WAS NOT REVERSIBLE ERROR.

During the first day of trial, counsel for Mr. Heck, Sr. informed the trial court of Mr. Heck's hearing disorder, and requested that Wallace Heck, Jr. be exempted from the Court's sequestration order in an effort to communicate with his father regarding the events of the trial. The trial court refused the request.

Four days later, Mr. Heck, Sr. was forced to present expert testimony regarding his hearing deficiency. At that time, the court permitted Mr. Heck's other son, Raymond Heck, to act as interpreter. However, only Wallace Heck, Jr. was qualified to perform this task, as it was he who was familiar with the transactions and could make notes of the meaningful testimony for his father's comments.

Counsel also requested that Wallace Heck, Jr., as an authorized officer of the corporation, be excluded from the sequestration order. This request was also denied by the trial court. The denial prejudiced H. G. Distributors, denying it the ability to appoint a corporate representative to assist in its defense of these proceedings.

The trial court violated two well-established principles of Louisiana law. The first is Louisiana Code of Civil Procedure article 1631, which provides:

> The court has the power to require that the proceedings shall be conducted with the dignity and in an orderly and expeditious manner, and to control the proceedings at the trial, so that justice is done.
>
> On it [sic] own motion the court may, and on request of a party the court shall, order that the witnesses, *other than parties*, be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. In the interest of justice, the court may exempt any witness from its order. (emphasis supplied).

Comment (h) to article 1631 sets forth the widely-recognized rule with respect to the appointment of corporate representatives. It states:

> [S]ince a corporation can act only through an agent, it is intended that *a corporation's representative present at the trial is not to be excluded, even though he may be a witness in the case.* (emphasis supplied).

See also, Maryland Casualty Co. v. DeVilbiss Co., 323 So.2d 871, 873 (La. App. 2nd Cir. 1975).

Both H. G. Distributors and Wallace Heck, Sr. were parties to this litigation, and both were entitled to be represented in the courtroom. The provisions of the rule are mandatory.

The trial court also violated Louisiana Code of Civil Procedure article 192.1, which provides, in pertinent part:

> A. In all civil cases and in the taking of any deposition where a party or a witness is a deaf or severely hard-of-hearing person, the proceedings of the trial shall be interpreted to him in a

> language that he can understand by a qualified interpreter appointed by the court.

Again, this article is a mandatory provision affirmatively requiring the court to appoint a person to interpret the proceedings in a language that the party can understand.

The court below found these errors harmless, even though a review of the trial record reveals a circus atmosphere in which the court required Mr. Heck to look at his attorney, and not his questioner, in order to determine when objections were being made. To the extent this Court believes the error to be harmless, it is submitted that it could *never* be established otherwise, as one can never know what assistance a party could offer if he could hear and understand the proceedings. That is why the codal provisions are mandatory.
